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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-671 & 78-672

DELAWARE STATE BOARD OF EDUCATION and ALEXIS I. DuPONT SCHOOL DISTRICT, et al.,

Petitioners,

vs.

BRENDA EVANS, et al.,

Respondents.

PLAINTIFF'S BRIEF IN OPPOSITION TO CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Question Presented	1
Statement	1
A. Introduction	1
B. Prior Proceedings	2
Liability Ruling	4
Primary Remedy Decree	6
"Reverse Volunteerism"	9
Secondary Remedy Decree	11
Reasons for Denying Certiorari	15
Conclusion	21

TABLE OF AUTHORITIES

Page

Cases

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144 (1970) 19

Alexis I. DuPont School District v. *Evans*, ____ U.S. ____ (No. A-188, Sept. 8, 1978) (Rehnquist, Circuit Justice) 17, 19

Brown v. *Board of Education*, 347 U.S. 483 (1954) 3, 4, 14, 16, 20

Brown v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*) 16, 17

Buchanan v. *Evans*, 423 U.S. 963 (1975) 2, 5, 15

Buchanan v. *Evans*, ____ U.S. ____ (No. A-188, Sept. 1, 1978), 47 U.S.L.W. 3127 (Sept. 12, 1978) (Brennan, Circuit Justice) 6

Dayton Board of Education v. *Brinkman*, 433 U.S. 406 (1977) 8, 9, 13, 17

Delaware State Board of Education v. *Evans*, 434 U.S. 880 (1977) 2, 9, 16, 18

Evans v. *Buchanan*, 195 F.Supp. 321 (D. Del. 1961) 3

Evans v. *Buchanan*, 379 F.Supp. 1218 (D. Del. 1974) 3

Evans v. *Buchanan*, 393 F.Supp. 428 (D. Del. 1975) 2, 3, 4, 5, 13, 15

Evans v. *Buchanan*, 416 F.Supp. 328 (D. Del. 1976) 2, 6, 7, 13, 16, 17, 18

TABLE OF AUTHORITIES (Continued)

Page

Evans v. *Buchanan*, 435 F.Supp. 832 (D. Del. 1977) 10, 11

Evans v. Buchanan, 555 F.2d 373 (3d Cir. 1977) 2, 7, 8, 9, 16, 18

Evans v. *Buchanan*, 447 F.Supp. 982 D. Del. 1978) 9, 11, 12, 13, 14, 15, 16

Evans v. *Buchanan*, Nos. 77-2336/7, 78-1143/8 and 78-1743 (3d Cir. July 24, 1978) (*en banc*) 7, 8, 9, 10, 11, 12, 13, 14, 15

Green v. *County School Board*, 391 U.S. 430 (1968) 11

Hills v. *Gautreaux*, 425 U.S. 284 (1976) 8

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 17

Milliken v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I*) 4, 6, 8, 13, 15, 16, 17, 18

Milliken v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*) 20

Neely v. *Martin K. Eby Construction Co.*, 386 U.S. 317 (1967) 19

Swann v. *Board of Education*, 402 U.S. 1 (1971) 6, 13,14, 16, 18, 19

United States v. *Santana*, 427 U.S. (1976) 19

Statutory Provisions

28 U.S.C. §2281 3

TABLE OF AUTHORITIES (Continued)

	Page
28 U.S.C. §1253	5
Rule 23(1)(c) of the Rules of the Supreme Court of the United States	19, 20
Rule 40(1)(d)(2) of the Rules of the Supreme Court of the United States	20
DEL. CODE tit. 14, §§1004(c)(2), 1004(c)(4) and 1005	3

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QUESTION PRESENTED

Given this Court's prior affirmance of the interdistrict liability ruling and prior refusal to review the primary remedy decree establishing the scope of desegregation and the framework necessary for dismantling the interdistrict dual system, does the subsequent secondary remedy decree approved by the courts below to implement these prior decisions raise any new issue warranting this Court's review?

STATEMENT

A. Introduction

For the fourth time in three years, the Delaware State Board of Education and seven other Petitioners (local school districts) seek to invoke this Court's jurisdiction to

review lower court rulings that the unconstitutional actions by the State of Delaware and responsible state and local school authorities caused the school segregation in Northern New Castle County on an interdistrict or area-wide basis and that an interdistrict remedy must therefore be implemented of commensurate scope. As in their prior efforts, Petitioners persist both in regarding almost no issue in this case as having been settled by this Court's prior dispositions and in making sweeping mischaracterizations of the rulings and proceedings below. This time the local school district Petitioners also suggest (*e.g.*, Pet. 11, 16, 23-25, 35-36) that the previously settled law of this case as to both violation and remedy should now be scuttled, along with the desegregation plan that has been implemented, on the asserted ground that this Court did not know what it was doing when it first affirmed (423 U.S. 963) the interdistrict liability ruling of the Three-Judge Court (393 F.Supp. 428) and then denied certiorari (434 U.S. 880) from the Third Circuit's affirmance (555 F.2d 373) of the primary remedy decree (416 F.Supp. 328) ordering that the scope of relief fit the interdistrict nature and area-wide extent of the violation.

A summary of the prior proceedings and rulings may assist in showing that the lower courts applied the proper legal standards for violation and remedy, that this Court's prior dispositions were fully informed and resolved the major violation and remedy issues, and that the details of the secondary remedy decree approved below raise no new issue worthy of review.

B. Prior Proceedings

This is the last phase of a lawsuit begun in 1957 whose "object was to eliminate *de jure* segregation in Delaware schools," including those of New Castle County as well as other areas of the state. 393 F.Supp. at 430. Although a plan for desegregation of Delaware schools was accepted

in 1961, the District Court approved the plan "only to the extent that it [would prove] effective," 379 F.Supp. 1218, 1222 (1974), and retained jurisdiction, 195 F.Supp. 321, 325 (1961). The plan did not prove effective in New Castle County. 379 F.Supp. at 1223 and 1228-30; 393 F.Supp. at 433, 437-438.

The interdistrict violations later found were rooted in circumstances existing at the time of *Brown v. Board of Education*. Local school districts in Delaware at that time were "not meaningfully 'separate and autonomous,' " 393 F.Supp. at 437, but rather were subordinate to the State system of segregation with boundaries that were dual and overlapping, permeable, or disregarded for the purpose of imposing racially segregated schooling. To deal with this, the District Court's 1961 decree ordered, as part of the plan for desegregation, the State Board to submit a revised school code to the legislature, including a reorganization of the "crazy-quilt pattern of [school] districts and laws governing education." 195 F.Supp. at 325.

In belated response, the legislature in 1968 enacted the Educational Advancement Act which explicitly excluded the Wilmington school district from the discretion vested in the State Board to reorganize all districts in the state, expressly providing that the boundaries for this "reorganized school district shall be the City of Wilmington with the territory within its limits." 14 Del. C. §§1004(c)(2), 1004(c)(4), and 1005.

In 1971, plaintiffs, by amended complaint, petitioned the District Court for supplemental relief; challenged the constitutionality of the 1968 Act and redistricting; and requested that the continuing interdistrict segregation in New Castle County be finally and effectively dismantled. A three-judge court was convened pursuant to 28 U.S.C. 2281. On July 12, 1974, following a lengthy evidentiary hearing, briefs and argument, the Three-Judge Court found

continuing *de jure* violations within Wilmington, but reserved ruling on the claims of interdistrict segregation including the constitutionality of the 1968 Act. 379 F.Supp. 1218.

After this Court issued its opinion in *Milliken* v. *Bradley*, 418 U.S. 717 (1974), the Three-Judge Court promptly invited the reorganized school districts of New Castle County to intervene and present evidence on all the issues raised by plaintiffs' 1971 Petition for Supplemental Relief and Amended Complaint. Suburban school districts intervened as parties defendant;[1] they elected to adopt the State Board pleadings and to stand on the evidence already of record and to submit briefs on the interdistrict violation issues and the impact of *Milliken*. Primary issues litigated by the parties included the alleged continuing nature of the historic interdistrict dual system; the purpose and effect of acts following *Brown*, including a state-wide reorganization of school districts, alleged to be either independent constitutional violations or ineffective means of eliminating the continuing effects of the historic interdistrict *de jure* segregation; and the extent to which the existing racial disparity in enrollments between Wilmington and suburban New Castle County school districts resulted from the interdistrict effect of any constitutional violations rather than other causes.

Liability Ruling. On March 27, 1975, the Three-Judge Court, Judge Layton dissenting, expressly applied the *Milliken* legal standards (393 F.Supp. at 431-432, 437-438, 446) to the record evidence and found:

1. The "historic arrangement for interdistrict segregation within New Castle County" (393 F.Supp. at 447) "was a cooperative venture involving both

[1] The Wilmington school district had previously intervened as a party plaintiff and joined in the Petition and Amended Com .plaint.

city and suburbs" to implement State-mandated "*de jure* segregation" (393 F.Supp. at 437); "at that time, in other words, Wilmington and suburban [school] districts were not meaningfully 'separate and autonomous.' " *Id.*

2. "Significant governmental involvement in interdistrict discrimination" (393 F.Supp. at 447), which perpetuated and augmented (393 F.Supp. at 432-438) rather than dismantled this historic arrangement for complete segregation on an interdistrict basis, is *"responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs in the past two decades."* 393 F.Supp. at 438 (emphasis supplied).

3. In addition, the Educational Advancement Act, which unconstitutionally redrew school district lines by excluding the Wilmington School District from consideration for reorganization or consolidation in the 1968 state-wide action, *"played a significant part in maintaining the racial identifiability of Wilmington and the surburban New Castle County school districts."* 393 F.Supp. at 445 (emphasis supplied).

Accordingly, the Three-Judge Court declared the provisions excluding Wilmington from the consolidation unconstitutional and directed the parties to submit alternative interdistrict and intradistrict desegregation plans. 393 F.Supp. at 447.

The defendants appealed the interdistrict violation judgment and order by invoking this Court's jurisdiction under 28 U.S.C. 1253. Plaintiffs filed a Motion to Dismiss or Affirm, arguing that there were substantial grounds for either disposition. This Court summarily affirmed the interdistrict violation ruling (Rehnquist, J., joined by Burger, C. J., and Powell, J., dissenting, on the grounds that the appeal did not lie under 28 U.S.C. 1253 within the Supreme Court's jurisdiction because the case was not one required to be heard by a three-judge court). 423 U.S. 963. The interdistrict liability ruling "thus constitutes the law of the

case. . ." *Buchanan* v. *Evans*, ____ U.S. ____ (No. A-188 Sept. 1, 1978), 47 L.W. 3127, 3128 (Brennan, Circuit Justice) (Slip Op. 4).

Primary Remedy Decree. Following evidentiary hearings on plans submitted, and expressly applying *Swann* and *Milliken* legal standards (416 F.Supp. 328, 338-341) to the record evidence and previously affirmed violation ruling, the Three-Judge Court recognized its remedial duty to insure relief that "will place the victims of the violation in substantially the position which they would have occupied had the violation not occurred" (416 F.Supp. at 341). Based thereon, the Three-Judge Court found:

> 1. The unconstitutional acts previously found *"had a substantial, not a de minimis, effect on the enrollment patterns of the separate districts,"* 416 F.Supp. at 339 (emphasis supplied).
>
> 2. The continuing unconstitutional action of the State, and the State Legislature and State Board, *"is a substantial and proximate cause of the existing disparity in racial enrollments in the districts of Northern New Castle County."* 416 F.Supp. at 339 (emphasis supplied).

3. Wilmington-only relief therefore would not remedy the area-wide impact of the violation. 416 F.Supp. at 341-344.

4. The free choice and magnet plans proposed are "inadequate as remedies" because those plans do not promise realistically to overcome the interdistrict impact of the violation (416 F.Supp. at 346); voluntary magnet proposals have not proven effective as remedies, and "no showing" was made that actual desegregation would "occur *in fact* as a part of the operation of magnet schools." 416 F.Supp. at 346.

5. In view of the difficulties with cross-district assignments between existing districts and court-ordered redistricting (416 F.Supp. at 347-351), interim "consolidation or reorganization is required" pursuant to the existing state law model subject at all

times to the State's adoption of any effective and constitutional alternative. 416 F.Supp. at 350-353, 357.[2]

6. In view of the area-wide impact of the violation, the geographic scope of the remedy must include Northern New Castle (except for Appoquinimink) (416 F.Supp. at 353-355); and the responsible school authority, insofar as it proposes to maintain one-race schools, will bear the burden of showing that such assignments are genuinely nondiscriminatory rather than the result of the continuing interdistrict "dual system." 416 F.Supp. at 355 and n.135; *see also* 416 F.Supp. at 357 n.149.

7. With respect to governance, the State Legislature should have the first opportunity to reorganize school districts; but, absent effective and constitutional legislative action, the provisional consolidation of the existing districts under a single interim board (made up of existing local school authorities appointed by the State Board) would go into operation no later than September, 1977 for secondary schools and September, 1978 for elementary schools, 416 F.Supp. at 357-358.

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[2] This decision was based on (a) the *defendants'* evidence and representation that transfers across existing districts would create administrative conflicts requiring constant judicial supervision and the Three-Judge Court's determination that it should leave such day-to-day school affairs in the hands of the responsible school authorities in order to avoid judicial intervention if a less intrusive remedy were available (416 F. Supp. at 347-348); and (b) the Three-Judge Court's view that any reorganization by redistricting would involve a variety of policy choices better left to the state legislature (416 F.Supp. at 350-352). As a result, the Three-Judge Court, in order to intrude as little as possible in state policy and local school administration, chose to rely on an interim consolidation (with planning and implementation in the hands of the responsible school authorities and reliance on existing state law) so long as the State chose not to take effective alternative action. 416 F.Supp. at 351-353, 357. In sum, this provisional or stand-by governance plan was specifically designed to *minimize* judicial intervention and to give responsible State authority the opportunity to come forward with an effective remedy. *See also* 555 F.2d at 380-381; Pet. App. All.

These ultimate fact findings and legal holdings concerning the extent of the continuing violation, the scope of its impact, requisite scope of desegregation, and the governance aspects of the remedial framework were amply supported by evidence, subsidiary fact findings, and law. As a result, they were specifically affirmed by the Court of Appeals (555 F.2d 573; *also* Pet. App. A13, A30), with the added direction that State authorities file with the District Court within sixty days a report of their efforts to carry out the mandate of the District Court (555 F.2d at 381; *also* Pet. App. A13).[3] So that there would be no misunderstanding of its judgment, the Court of Appeals detailed a revised, primary remedy decree to be entered by the District Court. *See* 555 F.2d at 381-382.

There was no confusion among the State and local defendants as to the area-wide scope of remedy thereby affirmed by the Court of Appeals' judgment, the provision for a third opportunity for the State to come forward with an effective alternative in the first instance, *and* the decreed consequences of a provisional consolidation of the affected districts so long as the State refused to come forward with an effective alternative. The defendants raised all of these remedy issues in their certiorari petitions to this Court arguing that the lower court's judgment failed to adhere to *Dayton, Milliken,* and/or *Gautreaux.* Plaintiffs responded that this primary remedy decree was fully supported by these decisions based on the particular circumstances, proceedings, evidence, and findings in this case. This Court denied certiorari (the Chief Justice, Mr. Justice Powell, and Mr. Justice Rehnquist dissenting by noting that they would grant the petitions, "vacate the judgment,

[3] The Third Circuit, like the Three-Judge Court, reviewed and affirmed the scope of the remedy pursuant to the *Milliken* legal standard governing the tailoring of equitable relief to do no more than overcome the proven effects of any constitutional violation. 555 F.2d at 379-380; *also* Pet. App. A11-A12, A30.

and remand the case . . . for further consideration in light of *Dayton*"). 434 U.S. 880 (1977), *rehearing denied,* 434 U.S. 944 (1977).[4]

"Reverse Volunteerism." Pursuant to the Third Circuit's direction, the District Court immediately entered the revised decree (*see* 555 F.2d at 381-382). Sixty days later the State Board filed its "Report" revealing that the State Legislature and State Board had taken no action (except for "liberalization" of the preexisting "free choice" inter-district transfer legislation). Instead, the State Board proposed that the District Court, in the absence of any implementing legislation or reorganization, order a "plan" dubbed "reverse volunteerism" whereby every Wilmington black student (but *only* these black students) would be reassigned to existing suburban districts with the absolute right to transfer back to the Wilmington district. Plaintiffs filed written objections and presented substantial evidence in opposition to show that the proposal (a) was as totally ineffective as the "free choice" plans and transfers previously rejected by the Three-Judge Court and (b), adding insult to this injury, was also racially stigmatizing in concept and wholly inequitable in operation. In contrast, defendants offered *no* evidence to show (a) that "reverse volunteerism," or any other voluntary transfer scheme, promised to operate in fact to remedy the continued marked racial disparity in enrollments between districts caused by the violation or (b) that the substantial area-wide impact of the inter-district violation was less extensive in any respect than previously found. Indeed, defendants represented that they had no such proof to offer. *E.g.,* Pet. App. A26; A153***.

[4] In the event that any member of the Court may wish to determine whether to reconsider the liability ruling or primary remedy decree, the subsidiary fact findings, rulings, and evidence supporting these judgments are discussed in plaintiffs' previous Brief in Opposition to Certiorari, October 1977 Term, in Nos. 77-131, et al. at pages 10-30.

After reviewing the prior proceedings and the evidence, the District Court on August 5, 1977 rejected "reverse volunteerism" both because it violated the mandate of the Third Circuit in failing to provide any supporting legislation or reorganization (Pet. App. A77-A78) and because it was wholly inequitable and totally ineffective as a remedy for the interdistrict violation of the nature, extent, and impact previously found by the Three-Judge Court (Pet. App. A78-A80).[5] At bottom, the proposal "like its reference to the legislative transfer plan, in which only three white students took part, . . . carried with it the tacit assumption that only — and that all — black students benefit from transferring to a white environment, and not vice versa." Pet. App. A17. "One would find it difficult to create a more graphic pardigm of an inequitable remedy than one which assigns to those who have been wronged the [sole] responsibility of correcting those wrongs." Pet. App. A78; *also* Pet. App. A18.[6] The Court of Appeals unanimously affirmed the District Court's determination that the State Board's Report and "reverse volunteerism" proposal represented nothing but an affirmative statement of the State's continuing default. Pet. App. A13-A19.

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[5] In evaluating the positions of the parties concerning the nature, extent, impact and effect of the continuing interdistrict violation (435 F.Supp. at 844-845), and reviewing the record evidence and Three-Judge Court findings, the District Court noted that (a) the "trier of fact" had previously found that "the vestiges of an interdistrict *de jure* segregated school system" had not been dismantled and (b) the "three-judge court made all the subsidiary findings with respect to discriminatory intent and incremental segregative effect (unless that phrase is to mean precise mathematical percentage) that the record permits without resort to sheer speculation." Pet. App. A88 and n.45.

[6] With respect to the defendants' claim that the legislature's stopgap "free choice" scheme "is adequate to overcome the dual school system and the pervasive effects of *de jure* segregation," the District Court found:

> Not only is the evidence to the contrary, but the voluntary transfer legislation suffers from the same basic flaws that proved fatal to the State Board's alternate proposal known as "reverse volunteerism" . . . Absent any evidence that [reverse volunteerism] would work and given the more than 20 years that the State has had to dismantle its dual system, this Court concluded that the plan's disparate [racial] burden and "too little, too late" character rendered it unacceptable under *Green* v. *County School Board*, 391 U.S. 430, 438-9 (1968; 435 F.Supp. 832, 841 (1977). The voluntary plan promises even less.

Pet. App. A134. Only *three* white students transferred into Wilmington schools (Pet. App. A16, A71 n.14); as a result, the *de jure* black schools remained virtually all-black under the State's "free transfer" legislation.

Secondary Remedy Decree. Pursuant to the Third Circuit's mandate, the District Court therefore directed the State Board to appoint the five members to the new interim school board, with four of the five members from the defendant suburban school districts and the fifth from the intervening plaintiff Wilmington School District. The District Court, however, granted a stay of the implementation previously scheduled for September, 1977 to allow the responsible school authorities additional time to plan and the defendants time to petition for review of the Third Circuit's affirmance of the Three-Judge Court's primary remedy decree. Pet. App. A94-A97; *also* Pet. App. A19.

In the fall, the District Court held extensive hearings on a "10-2" grade-center approach (with two grades in Wilmington and ten grades in the suburbs) proposed by the new Board majority, a regional clustering approach proposed by the new Board minority, and a modification of the Board's grade-center approach to provide for three grade-centers (including in Wilmington) in order to eliminate the inequitable and unjustifiably discriminatory aspects of "10-2" in the particular circumstances of this case. Once again no defendant offered any evidence (or alternative plan) to suggest that the scope of any of these remedial proposals was more extensive than the impact of the violation. *E.g.*, Pet. App. A26. And the new Board

the local school authority with the express responsibility under the mandate for assigning students, proposed no plan of lesser scope. In a detailed ruling, the District Court therefore authorized the new Board to exercise its discretion to develop, and then to implement commencing September, 1978, a plan of pupil reassignments based on a three-grade center approach. Pet. App. A150-A151.[7] In view of the procedural posture and law of the case, that was all that the District Court was required to do to insure, at long last, the transition to a racially nondiscriminatory system of pupil assignments in Northern New Castle County pursuant to the Third Circuit's express mandate, which this Court had previously declined to review.

In an abundance of caution, however, both the District Court and the Court of Appeals again evaluated the extent and continuing impact of the interdistrict violation, as

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[7] Even in this ruling, after extensive hearings and findings on the relevant issues dividing the litigants on the "10-2" or "9-3" concepts (Pet. App. A119-A151), the District Court invited the new Board to apply for relief from the "9-3" approach if it proved difficult in the development and detailing of an actual plan of reassignments. Pet. App. A151. The new Board thereafter developed and adopted a "9-3" plan of pupil assignments. No Petitioner argued in the Third Circuit that the District Court abused its discretion in acquiescing in the pupil assignment "grade-center" concept proposed by the responsible local school authority that was modified below only to the extent necessary to eliminate the racial inequity inherent in the "10-2" variation (Pet. App. A136-A151); and no Petitioner claims in this Court any error in the lower courts' acceptance of the grade-center concept proposed by the new Board. Instead their attack was, and is, solely on prior decisions of the lower courts determining the scope of violation and remedy and rejecting proposals predicated solely on volunteerism.

Similarly, the local district defendants did not contest in the District Court or on appeal the manifest propriety, on the uncontroverted evidence presented, of the ancillary relief approved generally below (*see* Pet. App. A162-A169). With the Third Circuit's ruling finally approving the ancillary relief ordered (Pet. App. A32-A47) and preliminarily approving the authorization and cap on local taxes to support the new district subsequently passed by the legislature (Pet. App. A48-A61), the State Board apparently has also dropped any claim of error on this score in its Petition.

found by the Three-Judge Court, to insure that the scope of the remedy finally approved would match the current effect of the violation. Pet. App. A11-A12, A22-A31, A152-A156. Reiterating that the Three-Judge Court had already specifically applied the appropriate remedial standard articulated by this Court (Pet. App. A130, A152, A30; 416 F.Supp. at 341), the District Court, as affirmed by the Court of Appeals, found that, "in satisfying its [remedial] duty, the Three-Judge Court relied primarily upon *Milliken I* and *Swann, supra,* and made the detailed findings of fact and reasoned statement of law later explicitly required by *Dayton.*" Pet. App. A152; *also* Pet. App. A30.[8] With respect to discriminatory intent and "incremental segregative effect," the District Court reiterated "its prior holding that 'the three-judge court made all the subsidiary findings . . . that the record permits without resort to sheer speculation.'" A153***. The District Court concluded by holding:

> . . . the firmly established constitutional violations in this case are the perpetuation of a dual school system and the vestige effects of pervasive *de jure* inter-district segregation. *Evans* v. *Buchanan,* 416 F.Supp. at 343; 393 F.Supp. at 432-38, 445, 447. *Dayton* reaffirms that "[o]nce a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" 97 S.Ct. at 2775; *see Milliken I,* 418 U.S. at 744; *Swann,* 402 U.S. at 16. Eradication of the constitutional violation to the scope and extent enumerated by the three-judge court is all that any of the plans and concepts submitted purport to ac-

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[8] Both the Three-Judge Court and the Court of Appeals in first shaping and then reviewing the remedial framework through the conscientious application of *Swann* and *Milliken* legal standards had previously used the "*same* precepts" (Pet. App. A12) for judging causation and the appropriate scope of remedy subsequently announced by this Court in *Dayton. See also Statement, supra,* pp. 6-7 and 8 n.3.

> complish, and that is all the concept endorsed by the Court does accomplish.

A156. Thus did the District Court meet its "duty" under the mandates of *Brown* and of the Third Circuit "to insure the elimination of the interdistrict racially discriminatory dual school system that has persisted in New Castle County." Pet. App. A130.

Noting that the "condition that [here] offends the Constitution," *Swann*, 402 U.S. at 17, is "pervasive *de jure* interdistrict segregation throughout Wilmington and the named Northern New Castle County school districts," the Court of Appeals affirmed the trial court's approval of the new Board's proposal in order "to restore" area schools to the status they "would have enjoyed but for the constitutional violations." Pet. App. A25; *also* Pet. App. A26-A30.

The Court of Appeals concluded by reiterating that "the primary responsibility to devise a suitable plan [for Northern New Castle County] was and is that of the State of Delaware" and had been at least since *Brown*. Pet. App. A30-A31; *see also* Pet. App. A11, A19, A26-A27. After having "dragged its heels and obstructed progress toward desegregation for twenty-six years" (Pet. App. A27), the plan approved by the courts below "was promulgated" and remains in place "only because the State, through its legislature or its board of education" has thus far "failed to come forward" with an effective alternative. Pet. App. A61; *also* Pet. App. A134-A136.

> State authorities are still invited, nay, urged, to come forward with meaningful solutions to this vexing problem, solutions that will achieve the same objectives as the court-ordered plan. Continued criticism, organized or otherwise, formal or informal, of the plan ordered by the federal courts as a last resort, is an insufficient and ill-advised response to the void caused by State inaction.

Pet. App. A62, A134-A136.

This continuing invitation by the Court of Appeals, in the face of the State's longstanding and steadfast default, is consistent with the studied restraint and deference of the lower courts here: to go to "virtually unprecedented lengths to minimize federal court intrusion," to "defer to the State Legislature to cure the constitutional violation," to afford several years of delay "to promote an orderly transition," and only to intervene to guarantee relief to the extent necessary by establishing a provisional consolidation controlled by local school authorities pursuant to the existing state law model and to remain in operation only so long as the State defaults by choosing not to come forward with an effective and constitutional alternative. Pet. App. A105; *also, e.g.*, Pet. App. A11, 416 F.Supp. at 357.

Following the denials by Justices Brennan and Rehnquist of stay applications, the new Board this September implemented its plan dismantling, at long last, the interdistrict dual system that heretofore has riven public schooling throughout Northern New Castle County on a racially dual basis.

REASONS FOR DENYING CERTIORARI

1. The substantiality and extent of the interdistrict *de jure* segregation violation in Northern New Castle County Public Schools has long since been adjudicated by the Three-Judge Court, and affirmed by this Court, pursuant to the application of the *Milliken* legal standard to the record evidence. Petitioners' attempt to recast the determinations of the Three-Judge Court on this score are at best belated attempts to relitigate factual issues which they finally lost on the evidence and factual findings three years ago before the Three-Judge Court, 393 F.Supp. 428, *aff'd* 423 U.S. 963. There is no reason to reexamine the settled law of the case concerning the nature and extent of the violation.

2. Similarly, the Three-Judge Court's restrained exercise of equitable discretion in fashioning the primary remedy decree pursuant to the *Swann* and *Milliken* standards, 416 F.Supp. 328, has long since been affirmed by the Court of Appeals, 555 F.2d 373, with review being denied by this Court. 434 U.S. 880. Given the nature and extent of the established interdistrict violation — "the interdistrict racially discriminatory dual system that has persisted in New Castle County" since *Brown* (Pet. App. A130) — the lower courts, of course, had "a duty to prescribe appropriate remedies." *Milliken* v. *Bradley*, 418 U.S. at 744; *Brown II*, 349 U.S. 294, 300-301. As to the structure for governing and administering the requisite interdistrict relief, three alternatives were available: retaining existing districts with transfers across district lines, redrawing school district lines, or consolidation pursuant to the existing state law model. Given the defendants' objections (and substantial proof in opposition) to retaining existing districts and the greater judicial intervention into local school operations and state policy choices required by cross-district assignments or redrawing school district boundaries, the Three-Judge Court did not err in choosing the least intrusive alternative: consolidation pursuant to the existing state law model with racially unitary schools operated by a new local school board. In fact, the Three-Judge Court proceded with restraint by making this reorganization provisional on the State's adoption of any constitutional and effective alternative and by giving the State ample time to respond before requiring implementation of even this stand-by remedy.[9]

[9] The lower courts scrupulously adhered to existing state policy and practice in making the new Board the operational equivalent of every other local district in Delaware and thereby keeping the federal courts out of the business of running the public schools. (And the new Board is most assuredly *not* a surrogate for the District Court nor an appointed Master. The new Board was appointed by the Defendant State Board; four of its five members are managing agent board members of the suburban districts; and the new Board, its staff and teachers operate independently of the District Court just like any other local school board.) How the lower court's shaping of the required inter-district relief in this least intrusive and most restrained fashion imaginable — taking the concerns of the State and local districts into full account, deferring to the existing State law models and practice, and inviting the State to come forward with any effective alternative it might choose — could be compared to a "railroad reorganization" in Mr. Justice Rehnquist's opinion denying a renewed application for stay is a mystery. *Alexis I. DuPont School District* v. *Evans*, ____ U.S. ____ (No. A-188) (Sept. 8, 1978) (Slip Op. 4). The suggested comparison simply does not fit what has actually happened in this case. The Three-Judge Court and the District Court expressly relied on this Court's counsel in *Milliken I*, 418 U.S. at 742-744, and chose the least intrtusive approach of the provisional consolidatiton under the new Board subject to timely and alternative action by the State, precisely because it (a) *totally* avoided judicial involvement "in the day to day management of school affairs" (Mr. Justice Rehnquist's Stay Opinion, Slip Op. 4) and (b) gave the State every opportunity to exercise its policy choices and popular will to substitute any other constitutional school district arrangement. *See, e.g.*, 416 F.Supp. at 347-348, 350-353, 357.

The Third Circuit on appeal the first time, and this Court in denying review, therefore made no mistake in rejecting the defendants' claim of an abuse of discretion in the face of the State's continued decision not to propose any effective alternative. In essence, the defendants disagreed not with the Three-Judge Court's choice of one of the three available structural alternatives but rather with the Court's very "duty to prescribe appropriate remedies" at all in such circumstances. As that duty had long since been settled generally for federal remedy and *de jure* school cases (*see, e.g., Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) and *Brown II*, 349 U.S. 294, 300-301 (1955)) and interdistrict school segregation cases in particular (*see Milliken I*, 418 U.S. at 744, and *Brown II*, *supra*), the Third Circuit affirmed the primary remedy decree and this Court quite properly denied review. 555 F.2d 373, *cert. denied* 434 U.S. 880.

Similarly, the defendants' challenge to the scope of de-

segregation required by the Three-Judge Court on appeal to the Third Circuit the first time did not concern the extent of the relief actually tailored but rather the established duty (*see Swann*, 402 U.S. at 16-17, 24-26 and *Milliken I*, 418 U.S. at 744, 746) to "place the victims of the violation in substantially the position which they would have occupied had the violation not occurred" (416 F.Supp. at 341) by redressing the area-wide effect of the pervasive interdistrict violation. The Third Circuit on appeal from the primary decree, and this Court in denying review, therefore did not err in rejecting defendants' challenge to the basic duty itself. 555 F.2d 373, *cert. denied* 434 U.S. 880.

In their latest pleas to this Court, from the affirmance of the secondary remedy decree, Petitioners merely parrot their previous challenge to the basic duties already met in the primary remedy decree: (a) to prescribe an appropriate interdistrict remedy and (b) to overcome the area-wide impact of the substantial interdistrict violation by requiring desegregation to the same scope and extent. Given the fact that the District Court, in its secondary remedy judgment did no more than implement the primary remedy decree by tailoring the relief to eradicate but not exceed the adjudicated effects of the violation, as unanimously affirmed by the Court of Appeals, the Petitioners present no reason for this Court to reexamine the basic remedial duties already established for school cases generally and previously settled in this case.

3. With respect to the relatively narrow issues thereby left open for review at this time, Petitioners make no claim of error at all. *See* Statements note 7, p. 12, *supra*. First the suburban school district and State Petitioners make *no* claim of error concerning the lower courts' approval of the grade-center pupil assignment concept proposed by the new Board, as modified by the District Court to prevent gross racial discrimination against black students in the

reassignment process. The suburban school district and State Petitioners opposed the alternative regional clustering and pairing concept and strenuously preferred the new Board's grade-center approach in the trial court; and Petitioners made no claim of error concerning grade centers in their appeals to the Third Circuit. Under this Court's normal rules for refusing review in such circumstances, the District Court's decision to defer to the responsible school authorities' preference by approving the grade-center approach presents *no* issue for this Court. *Cf. Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *United States* v. *Santana*, 427 U.S. 38, 41 n.2 (1976); and *Neely* v. *Eby Const. Co.*, 386 U.S. 317, 330 (1967).[10]

Second, suburban school district petitioners supported

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[10] We are therefore at a loss to understand why Justice Rehnquist in his opinion denying a renewed application for stay criticizes this aspect of the decision below. *Alexis I. DuPont School District* v. *Evans*, ____ U.S. ____ (No. A-188) (Sept. 8, 1978) (Slip Op. 3). Moreover, the lower courts never reviewed the specific pupil assignments adopted by the new Board subsequent to the District Court's approval of the Board's recommended concept; the specific pupil assignments were properly vested in the sound discretion of the responsible school officials in thet first instance. *E.g., Swann*, 402 U.S. at 15-16. State and suburban school district defendants did not object in the trial court nor the court of appeals to the specific pupil assignments finally developed and adopted by the new Board in the exercise of its discretion. Despite Justice Rehnquist's invitation, we do not understand that either of the certiorari petitions even suggests that this Court should review the decision of the District Court to defer to the new Board's proposed grade-center approach as modified rather than approving the alternative regional approach or the court itself drawing a pupil assignment plan. As a result, the District Court's approval of the grade-center approach is not an issue for review, Rule 23(1)(c), Supreme Court Rules. But, even if the issue had been preserved and raised by Petitioners, it would *not* relate to the District Court's intervening in the affairs of he local school authority by drawing a Court plan as suggested in Mr. Justice Rehnquist's stay opinion (Slip Op. 3-4) because the Court here deferred to the local school authority by allowing the new Board to draw and to adopt the plan of pupil assignments based on the Board's own preferred grade-center approach.

the relief ancillary to pupil assignments finally approved by the lower courts pursuant to *Milliken II*, 433 U.S. 267 (1977), and the uncontroverted record evidence. The State Petitioners objected to such relief in the courts below apparently on the grounds that *Milliken II* was wrongly decided. But the State Board presented *no* proof to controvert the substantial evidence introduced in the District Court showing that such ancillary relief was necessary to overcome the effects of the violation as specifically found by the District Court (Pet. App. A162 *et seq.*) and unanimously affirmed by the Court of Appeals (Pet. App. A32-A46). In their Petition, the State defendants therefore understandably make *no* reference to this issue in their questions presented and argument and only a fleeting reference to ancillary relief at all in their statement (Pet. 7). Whether or not Supreme Court Rules 23(1)(c) and 40 (1)(d)(2) effectively bar consideration of the issue, there is absolutely no conflict between the restrained general guidelines for ancillary relief approved below and *Milliken II*, and *no* other reason for this Court to review the issue in view of the lower courts' express application of *Milliken II* to the uncontroverted record.

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In sum, Petitioners have failed to demonstrate any error in the Court of Appeals' judgment affirming the secondary remedy decree, any departure by the lower courts from this Court's violation and remedy standards, and any reason to revisit the settled law of this case. The official racial discrimination that for so long has divided public schooling in Northern New Castle County is at an end and the transition to racially nondiscriminatory schooling contemplated by *Brown* is finally in progress. The State of Delaware, the responsible state and local school authorities, and the people of Northern New Castle County are at last rid of the blight of racially dual schooling. They are free

to operate area schools in whatever constitutional way they deem fit, now and hereafter.

CONCLUSION

Wherefore, for the foregoing reasons, the Petition for a Writ of Certiorari should be denied forthwith.

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